

ISMAIL BIN HARON & ANOR. v. PUBLIC PROSECUTOR[C.A. (Thomson C.J., Hill and Syed Sheh Barakbah JJ.)
January 29, 1958]

[K.L. — F.M. Criminal Appeal No. 56 of 1957]

Criminal Law and Procedure — Charge of armed robbery — Corporal punishment — Defence reserved at preliminary inquiry — Impression of trial Judge of accused having criminal record.

The appellants were tried on two charges of committing armed robbery in contravention of sections 392 and 397 of the Penal Code. The offences were alleged to have been committed on May 15; the appellants were committed for trial on October 18; and the trial commenced on November 19, 1957. In the event both appellants were convicted on both charges; the 1st appellant was sentenced to six years' imprisonment and a whipping of 10 strokes on each charge; the second appellant was sentenced to four years' imprisonment and two years' police supervision.

Against these convictions and sentences they appealed. In the case of the 1st appellant the Court dismissed his appeal against conviction but allowed the appeal against sentence to the extent of quashing the sentence of corporal punishment in view of the fact that no violence was used at any stage of committing the offence.

As regards the second appellant, the whole case against him turned on the evidence of one witness (who, in the view of the Court of Appeal was an accomplice). The learned trial Judge basing himself on this witness's demeanour decided that his evidence was evidence of truth but in deciding that there was a case for the 2nd appellant to answer he said that he took two other matters into consideration: (i) that at the preliminary inquiry he had reserved his defence; and (ii) that his demeanour in Court and the nature of his cross-examination of the prosecution witnesses conveyed to him (the Judge) that "he was a man with a criminal record."

Held: neither of these considerations should have been permitted to influence the learned Judge's mind.

Observations on reservation of defence at preliminary inquiry.

Cases referred to:—

- (1) *R. v. Parker*, 24 Cr.App.R. 2.
- (2) *Sulaiman v. Public Prosecutor*, (1948) M.L.J. 32.
- (3) *R. v. Naylor*, 23 Cr.App.R. 177.

COURT OF APPEAL (CRIMINAL).

Appellants in person.

Mohamed Salleh bin Abas (Federal Counsel) for the respondent.

Thomson, C.J.:— These two appellants were tried at Kuala Lumpur on two charges of committing robbery while armed with a deadly weapon in contravention of sections 392 and 397 of the Penal Code. The offences were alleged to

have been committed on 15th May, 1957; the appellants were committed for trial on 18th October, 1957; and the trial commenced on 19th November, 1957. These dates are mentioned as they have a certain bearing on the evidence in the case.

In the event both appellants were convicted on both charges. The first appellant was sentenced to six years' imprisonment and a whipping of ten strokes on each charge, these sentences to run concurrently, whatever that may mean in relation to the sentences of corporal punishment. The second appellant was sentenced to four years' imprisonment and two years' Police supervision, these sentences to run concurrently.

Against these convictions and sentences the appellants appealed and their appeals were heard by this Court on 7th January, 1958. In the case of the first appellant the Court dismissed the appeal against conviction but allowed the appeal against sentence to the extent of quashing the somewhat incomprehensible sentence of corporal punishment. In the case of the second appellant the Court allowed the appeal and quashed the conviction.

The case for the prosecution was that between three and four a.m. on the morning of 15th May the two complainants were travelling by car from Kuala Lumpur to Ipoh. Some six miles from Kuala Lumpur they passed a stationary "M.G." car which switched on its lights shortly before they passed it. Three miles further on they were overtaken by this "M.G." car and another three miles further on they were stopped by four men standing by the roadside whom at first they mistook for Police. The "M.G." car was stationary at the side of the road and a P.W.D. wooden barrier had been placed across the road. One of the four men was armed with a pistol and two of the others with daggers. They proceeded to search the two complainants and their car and took from them two watches, a fountain pen and some money. The four men then got into the "M.G." car and drove off in the direction of Kuala Lumpur, taking with them the ignition key of the complainants' car.

That was the story of the two complainants and as regards what happened to them there seems to be no reason to doubt that it was true.

The evidence as to the identity of the robbers, however, was not so satisfactory. The first complainant identified the first appellant as the man who searched him. But he was not prepared to identify the second appellant nor did

he identify a prosecution witness with whose evidence I shall deal shortly. The second complainant was unable to identify any of the robbers. He said it was dark and he could not recognise anyone.

The third prosecution witness, one Syed Din, told a somewhat peculiar story. He said that on the evening of 14th May he was with the two appellants and they were approached by one Daud who asked them to meet him later. About midnight Daud arrived in an "M.G." motor-car and took the witness and the two appellants along the Ipoh Road for six miles where they waited. A car coming from Kuala Lumpur overtook them. They followed this car and overtook it and stopped it. The two complainants got out and he, the witness, searched the first complainant and took his money and watch while the second appellant searched the car. They then returned to Kuala Lumpur and parted. He said that the previous evening he had given information of some sort to the Police and that on returning to Kuala Lumpur he went to the Police Station and after giving some further information was arrested and detained in custody for five months. At the end of this period he was taken before a Magistrate on some charge and acquitted and discharged and very shortly after his discharge he gave evidence against the two appellants at the Preliminary Inquiry on 18th October, 1957.

On this evidence, for there was no other evidence of any importance, the trial Judge was clearly satisfied that a case had been made out against each of the appellants which if unrebutted would warrant his conviction and called upon each of them for his defence. Neither of them attempted to make any defence and both of them were then convicted.

As regards the first appellant he was identified by the first complainant and for what it was worth by the witness Syed Din. In his case we could see no justification for interfering with his conviction although in view of the fact that no violence was used at any stage of committing the offence we felt obliged to quash so much of his sentence as consisted of corporal punishment.

As regards the second appellant the case was very different. The whole case against him turned on the evidence of the witness Syed Din. And whether or not this witness was an accomplice (in our view he was) his evidence was such that it would clearly have been unsafe to convict anyone upon it without corroboration. The learned trial Judge basing himself on this

A witness's demeanour decided that his evidence was evidence of truth but in deciding that there was a case for the second appellant to answer he has said that he took two other matters into consideration. The first of these was that at the Preliminary Inquiry he had reserved his defence and the second was that his demeanour in Court and the nature of his cross-examination of the prosecution witnesses conveyed to His Lordship that "he was a man with a criminal record."

B Neither of these considerations should have been permitted to influence the learned Judge's mind.

C As regards the appellant's decision to reserve his defence at the Preliminary Inquiry there are circumstances in which notice may be taken of such a course in evaluating any defence set up at the trial (see *Parker*⁽¹⁾), although in this country such a course should only be taken in very exceptional cases (see *Sulaiman v. Public Prosecutor*⁽²⁾). In the present case, however, there was no question of any defence having been even indicated. At the close of the case for the prosecution the learned Judge was not aware what the defence was going to be. It might have been *alibi*, it might have been duress. And in the circumstances he should have guided himself by what was said in the case of *Naylor*.⁽³⁾ That was a case where the accused had been convicted on accomplice evidence and where at his trial the trial Judge had commented adversely on his not having made any statement before the committing Magistrate. Hewart, L.C.J., pointed out that at the Preliminary Inquiry the accused had been asked "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence upon your trial". (The formula is the same here — see Criminal Procedure Code section 141). His Lordship went on to observe (at page 180):—

H "It is not corroboration of incriminating evidence that the accused did not deny the charge or was silent about it. But it is well to add something further. When one looks at the words of the formula which must be deliberately framed, it is quite obvious that they were intended to convey and do convey to the prisoner the belief that he is not obliged to say anything unless he desires to do so. Now if those words are really to be construed in this sense, that, having heard them, an accused person remains silent at his peril and may find it a strong point against him at his trial that he did not say anything after being told he was not obliged to say anything, one can only think that this form of words is most unfortunate and misleading. We think that these words mean what they say and that an accused

person is quite entitled to say: 'I do not wish to say anything except that I am innocent'."

With regard to the point that the appellant "was a man with a criminal record", section 54 of the Evidence Ordinance reads as follows:—

"In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant."

Here no evidence was given that the appellant had a good character and the section means just what it says.

It is not possible to say exactly what weight the trial Judge attached to these considerations of the appellant reserving his defence at the Preliminary Inquiry and being a man of bad character. It is probable, however, that he attached very considerable weight to them because he has dealt with them at considerable length and with considerable emphasis in his Grounds of Judgment. In the circumstances it is at the lowest probable that if he had disregarded these considerations as he should have done he would not have called upon the appellant to make his defence and would have discharged him at the close of the case for the prosecution. In the circumstances we were of the opinion that we had no option but to set the conviction aside.

Conviction set aside.

TANGAMMAH CUMARASAMY v. CHAIRMAN, TOWN COUNCIL, TAIPING

[A.C.J. (Good J.) August 14, 1958]

[Ipoh — Civil Appeal No. 270 of 1957]

Landlord and Tenant — Annual value — Determination of — Controlled premises — Uncontrolled premises on land subject to restrictive conditions as to letting — Principles applicable — Control of Rent Ordinance, 1956 — Town Boards Enactment (Cap. 137).

Local Authority — Rates and rating — Assessment.

The sole test of ascertaining the "annual value" is "the estimated gross annual rent at which the holding might reasonably be expected to let from year to year." The Rating authorities must have regard to what a (not the) hypothetical tenant might reasonably be expected to pay bearing at the same time in mind the restrictions "created or imposed either by its natural position or by the artificial conditions" of a statute, but not restrictions created or imposed by contract between a landlord and tenant. The definition "annual value" in the Town Boards Enactment has the effect of constraining the Rating authority to have regard to statutory limitation on the annual rent exigible by the landlord.

The ground of appeal in this case was that the Town Council in assessing the annual value of each of the

A premises concerned erred in disregarding the provisions of the Control of Rent Ordinance to which all the premises were subject. The question for determination was whether the Control of Rent Ordinance affected the annual value of the premises for the purposes of rating.

Held: (1) where controlled premises have been previously let as a single unit whether such premises are occupied by the owner or a tenant, and the standard rent and permitted increases are known by reference either to a previous letting or to an order of the Rent Assessment Board fixing the maximum recoverable rent, the annual value thereof must be assessed on the basis of such rent.

(2) where such premises have not been previously let as a single unit but occupied either by the owner or his successor in title or jointly by the owner and tenant or tenants, a difficulty, which is a practical and not a legal one, arises from the absence of machinery for determining the maximum recoverable rent which is only determinable by the Rent Assessment Board under section 8(2) of the Control of Rent Ordinance upon an application by either a landlord or tenant or other person interested in respect of an existing tenancy. In such cases the Rating Authority must seek to arrive at a reasonable estimate of the figure at which the rent of the premises would be controlled if they were let;

(3) in the case of uncontrolled premises, where restrictive conditions as to letting are imposed by statute, the land is not struck with sterility; the occupational value to the owner (the hypothetical tenant) must be assessed having regard to the artificial conditions imposed by the State while issuing title.

Cases referred to:—

- (1) *Assessment Committee of the Metropolitan Borough of Poplar v. Roberts*, (1922) 2 A.C. 93.
- (2) *Rawlance v. Croydon Corporation*, (1952) 2 Q.B. 803; (1952) 2 All E.R. 535.
- (3) *Port-of-Spain Corporation v. Gordon, Grant & Co. Ltd.*, (1955) A.C. 389.
- (4) *Trimble v. Hill*, (1879), 5 App.Cas. 342, 344, 345.
- (5) *Nadarajan Chettiar v. Walauwa Mahatmee & Anor.*, (1950) A.C. 481; 66 T.L.R. (Pt.2) 15, 19, 20.
- (6) *Armstrong v. Estate Duty Commissioner*, (1937) A.C. 885; (1937) 2 All E.R. 484.
- (7) *Attorney-General of Ontario v. Perry*, (1934) A.C. 477; (1934) All E.R. Rep. 422.
- (8) *Commissioners of Inland Revenue v. Forrest*, (1890) A.C. 334.
- (9) *Commissioner of Stamps S.S. v. Oei Tjong Swan*, (1933) M.L.J. 107, 109.
- (10) *Magor v. Newport Corpn.*, (1952) A.C. 189, 191; (1951) 2 All E.R. 839.
- (11) *Grand Trunk Rly. Co. v. Washington*, (1899) A.C. 275, 280.